

Water Quality Certification

§279.1. General.

This chapter governs the issuance of state certifications under 33 United States Code §1341, Federal Water Pollution Control Act Amendments of 1972, the Clean Water Act §401. The Clean Water Act §401(a)(1) requires that any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities which may result in any discharge into navigable waters of the United States, shall obtain from the state in which the discharge originates or will originate a certification that the discharge will comply with applicable provisions of 33 United States Code §§1311, 1312, 1313, 1316 and 1317 (§§301, 302, 306 and 307 of the Act). Section 401(a)(1) of the Act further provides that the state shall establish procedures for public notice in the case of all applications for certification and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.

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§279.2. Purpose and Policy.

(a) This chapter establishes procedures and criteria for the application, processing and review of state water quality certifications for activities under the jurisdiction of the Texas Natural Resource Conservation Commission (TNRCC or commission) as required by the Federal Clean Water Act. It is the purpose of this chapter, consistent with the Federal Clean Water Act, to maintain the chemical, physical, and biological integrity of the State's waters.

(b) It is the policy of the commission to achieve no overall net loss of the existing wetlands resource base with respect to wetlands functions and values in the State of Texas. All activities under the jurisdiction of the TNRCC which require a federal license or permit and which may result in any discharge to waters of the United States will be reviewed for consistency with the Federal Clean Water Act and the Texas Surface Water Quality Standards. After such a review, the commission shall:

(1) grant certification for any activity which will not result in any discharge in violation of water quality standards or any other appropriate requirements as set forth in §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application);

(2) grant conditional certification stating the conditions necessary to prevent any activity which will result in a discharge from violating water quality standards or any other appropriate requirements as set forth in §279.9 of this title;

(3) deny certification for any activity which will result in a discharge in violation of water quality standards or any other appropriate requirements as set forth in §279.9 of this title; or

(4) waive certification for any activity which the commission finds will result in no discharge, or which does not fall within the purview of the commission's authority, or concerning which the commission expressly waives its authority to act on a request for certification for other reasons.

(c) The executive director is delegated the responsibility for performing all certification functions under this chapter on behalf of the commission, except that at the request of a commissioner or the executive director, the commission may review the question of certification prior to the executive director's determination on certification.

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§279.3. Definitions.

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

401 Certification - A certification issued by the state to assure that a federal permit or license is consistent with state law as authorized under §401 of the Federal Clean Water Act.

402 Permit - See NPDES permit

404 Permit - A Department of the Army permit issued under the authority of §404 of the Federal Clean Water Act which authorizes the discharge of dredged or fill material into waters of the United States. 404 permits can be either individual, general, or by letter of permission. Individual 404 permits are only issued following a case-by-case evaluation of a specific structure or work in accordance with 33 Code of Federal Regulations (CFR) Part 325, a determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320, and that the proposed action is consistent with 40 CFR Part 230 (§404(b)(1) Guidelines).

Activity - The construction, operation, maintenance, or modification of facilities, structures, channels, or equipment which may result in any discharge into or adjacent to waters in the state or which may otherwise affect water quality.

Affected person - Any person who is determined by the commission to have a legally justiciable interest that may be adversely affected by an action taken on a certification.

Applicant - Any person who applies for any license or permit granted by an agency of the federal government to conduct any activity which may result in any discharge into or adjacent to waters in the state.

Aquatic Ecosystem - Waters in the state, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

Clean Water Act - 33 United States Code §1151, et seq., the Clean Water Act §§101, et seq.

Commission - The Texas Natural Resource Conservation Commission, acting through the executive director pursuant to §279.2(c) of this title (relating to Purpose and Policy).

Department of the Army Permits - All permits and licenses issued by the Department of the Army Corps of Engineers, including 404 permits and permits issued under the authority of the Rivers and Harbors Act of 1899, §10.

Discharge - Deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of any pollutant, or to allow, permit, or suffer any of these acts or omissions.

District engineer - The Department of the Army representative responsible for administering, processing, and enforcing federal laws and regulations relating to the United States Army Corps of Engineers, including permitting.

Emergency - A condition either meeting the requirements of federal law as constituting an emergency or applicable provisions of §305.23 of this title (relating to Emergency Orders).

Executive Director - The executive director of the Texas Natural Resource Conservation Commission.

General permit - A permit authorized by a federal licensing or permitting agency on a regional basis. General permits are designed to regulate with little delay or paperwork, certain activities having minimal impacts.

Individual permit - A permit that is issued by a federal licensing or permitting agency following an evaluation of any activity including, but not limited to, the construction or operation of facilities which may result in any discharge into waters of the United States.

Licensing or permitting agency - Any agency of the federal government to which application is made for any license or permit to conduct an activity which may result in any discharge into or adjacent to waters in the state.

Nationwide permit - A type of General permit authorized by a federal licensing or permitting agency through publication in the Federal Register that is applicable throughout the nation. Nationwide permits are designed to regulate with little delay or paperwork, certain activities having minimal impacts.

National Pollutant Discharge Elimination System (NPDES) permit - A written document issued by the regional administrator of the United States Environmental Protection Agency (EPA) as required by §402 of the Federal Clean Water Act which authorizes the discharge of any pollutant, or combination of pollutants, into navigable waters of the United States.

Person - Any corporation, organization, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, individual, or other legal entity.

Pollutant - Any dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, sewage sludge, munitions, hazardous waste, hazardous substance, chemical waste, biological material, radioactive substance, heat, wrecked or discarded equipment, rock, sand, cellar dirt, or industrial, recreational, municipal, agricultural or other waste.

Practicable - Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Regional administrator - The administrator of the United States Environmental Protection Agency, Region 6.

Water dependent activity - an activity which is proposed for or adjacent to an aquatic site that requires access, proximity to, or siting within an aquatic site to fulfill its basic purpose.

Water quality limited segment - Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by the Federal Clean Water Act, §301(b) and §306.

Water Quality Standards - Texas Surface Water Quality Standards, 30 TAC §307.1, et.seq.

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§279.4. Application for Certification.

(a) National Pollutant Discharge Elimination System (NPDES) permits. No person may conduct any activity under federal permit or license which may result in any discharge into or adjacent to waters in the state unless the person has received a certification or waiver under this chapter. The regional administrator or the permit applicant may submit a request for certification.

(1) If state certification has not been received by the time the draft NPDES permit is prepared, the regional administrator shall, pursuant to 40 Code of Federal Regulations (CFR) §124.53, submit to the executive director:

(A) a copy of a draft permit; and

(B) a request for certification.

(2) If the permit applicant requests certification of the NPDES permit application, he shall submit to the executive director:

(A) a copy of the completed NPDES permit application and any amendments thereto;

(B) a list on a map or on a separate sheet attached to a map of the names and addresses of owners of tracts of land adjacent to the site to be permitted; and

(C) a request for certification.

(3) The executive director may elect to delay acting upon a request for certification until the draft NPDES permit is prepared and notice thereof has been issued.

(b) Department of the Army Permits. No person may conduct any activity under federal permit or license which may result in any discharge into or adjacent to waters in the state unless the person has received a certification or waiver under this chapter. The district engineer or the permit applicant may submit a request for certification.

(1) If state certification is requested by the district engineer, he shall, pursuant to 33 CFR §325.2(b)(ii), submit to the executive director:

(A) a copy of the public notice;

(B) a request for certification; and

(C) a copy of the complete permit application upon request.

(2) If the permit applicant requests certification, he shall submit to the executive director:

(A) a copy of the completed permit application and any amendments thereto;

(B) a list on a map or on a separate sheet attached to a map of the names and addresses of owners of tracts of land adjacent to the site to be permitted; and

(C) a request for certification.

(3) The executive director may elect to delay acting on a request for certification until after a review of a preliminary permit decision.

(c) Other federal licenses or permits. For those federal licenses or permits issued by federal agencies other than United States Environmental Protection Agency or the Department of the Army which may result in any discharge into or adjacent to waters in the state, the permittee must receive a certification or waiver under this chapter prior to conducting any permitted activity.

(1) If state certification is requested by the federal agency, that agency shall submit to the executive director:

(A) a copy of the public notice;

(B) a request for certification; and

(C) a copy of the complete permit application upon request.

(2) If the permit applicant requests certification, he shall submit to the executive director:

(A) a copy of the completed permit application and any amendments thereto;

(B) a list on a map or on a separate sheet attached to a map of the names or addresses of owners of tracts of land adjacent to the site to be permitted; and

(C) a request for certification.

(3) The executive director may elect to delay acting on a request for certification until the licensing or permitting agency publishes notice of the application and/or the executive director has reviewed the draft permit.

(d) Review of application for certification. Where the executive director believes more information is required in order to accomplish the review of the request for certification, he shall notify the applicant or licensing or permitting agency and request such information.

(e) Submission of additional materials. The applicant shall submit in timely fashion, at any time during the review process, additional materials which the executive director finds to be necessary for review of the application. In no case will the applicant have less than 30 days to submit the information.

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§279.5. Notice of Application.

(a) The executive director to the greatest extent practicable shall utilize a joint mailed notice issued by the Department of the Army, or the United States Environmental Protection Agency (EPA), or other licensing or permit agency after agreements with those agencies have been reached regarding the content of the notice and the persons entitled to notice in Texas.

(b) If a joint notice is not utilized as provided in subsection (a) of this section and the executive director finds that all necessary materials have been received, he shall mail notice of the application for certification to:

- (1) the adjacent landowners;
- (2) the mayor and health authorities of the city or town in which the activity is or will be located or in which waste is or will be disposed;
- (3) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed;
- (4) the Texas Parks and Wildlife Department;
- (5) the United States Department of Interior Fish and Wildlife Service;
- (6) the Texas Water Development Board;
- (7) the United States Commerce Department, National Marine Fisheries Service;
- (8) the EPA Region 6;
- (9) the Texas General Land Office;
- (10) the Secretary of the Coastal Coordination Council;
- (11) any known interested persons; and

(12) the applicant.

(c) Any public notice issued under subsection (b) of this section shall contain:

(1) the applicant's name and mailing address, together with the name and mailing address of the party conducting the activity, if different from the applicant;

(2) a brief written description of the activity;

(3) a statement that the applicant is seeking certification under the Federal Clean Water Act, §401;

(4) a statement that any comments concerning the application may be submitted to the executive director of the Texas Natural Resource Conservation Commission, Attention 401 Coordinator, P. O. Box 13087, Austin, Texas 78711-3087, and a deadline for written public comment of no less than 30 days;

(5) a statement that a copy of the application is available for review in the office of the federal licensing or permitting agency's office; and

(6) a statement indicating how affected persons can request a public hearing.

(d) The executive director may waive notice and hearing requirements of this subsection and §§279.6, 279.7, and 279.8 of this title (relating to Public Comments, Nonadjudicative Public Hearing, and Notice of Public Hearing), and issue a final commission action pursuant to §§279.10, 279.11, or 279.12 of this title (relating to Final Commission Action on NPDES Permits, Final Commission Action of Department of the Army Permits, and Other State Certification), when an emergency as defined in §279.3 of this title has been determined to exist and it is in the public interest to provide a certification in less than 30 days.

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§279.6. Public Comments.

The executive director shall consider all comments related to the impacts of the proposed activity submitted in accordance with these rules.

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§279.7. Nonadjudicative Public Hearings.

(a) The executive director may conduct a nonadjudicative public comment hearing on any application for 401 certification if the executive director determines that such a hearing would be appropriate or if such a hearing is requested by any affected person in writing within 30 days after the publication of notice of application. The executive director shall conduct a nonadjudicative public

comment hearing on an application for 401 certification if a request for such a hearing is made by a Commissioner. The written request shall contain the following information:

- (1) the name, mailing address, and phone number of the person making the request;
- (2) the application number or other recognizable reference to the application;
- (3) a brief description of the interest of the requestor, or of persons represented by the requestor; and
- (4) a brief description of how the application, if granted, would adversely affect such interest.

(b) If a hearing is held, the executive director shall notify the regional administrator in the case of a National Pollutant Discharge Elimination System (NPDES) permit certification or the district engineer in the case of a Department of the Army permit certification or the designated department of any other licensing or permitting agency, giving an estimate of the additional time necessary to consider the certification, and stating that the executive director is not waiving certification.

(c) All hearings held under this section shall be conducted by a representative of the executive director. Such representative shall receive comments concerning all matters affecting the 401 certification.

(d) After the hearing the executive director may consider any information provided at the hearing and any other information appropriate to determine whether to certify the activity.

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§279.8. Notice of Nonadjudicative Public Hearing.

(a) The executive director shall notify the applicant not less than 30 days before the date set for hearing that a nonadjudicative public hearing will be held on the application. Such notice shall be by certified mail, return receipt requested.

(b) Such notice of hearing shall identify the application; the date; time; place and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; the proposed action; the requirements for submitting written comments; the method for obtaining additional information; and such other information as the executive director deems necessary.

(c) The executive director will transmit the notice by first-class mail or by personal service to:

- (1) the adjacent landowners;
- (2) the mayor and health authorities of the city or town in which the activity is or will be located or in which waste is or will be disposed of;

(3) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed of;

(4) the Texas Parks and Wildlife Department;

(5) the United States Department of Interior Fish and Wildlife Service;

(6) the Texas Water Development Board;

(7) the United States Commerce Department, National Marine Fisheries Service;

(8) the United States Environmental Protection Agency, Region 6;

(9) the Texas General Land Office;

(10) the Secretary of the Coastal Coordination Council; and

(11) any known interested persons.

(d) The date of mailing such notice of hearing shall be at least 30 days before the date set for such hearing.

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§279.9. Executive Director Review of Water Quality Certification Application.

The executive director shall determine whether the proposed activity will:

(1) result in any discharge;

(2) result in any violation of the Federal Clean Water Act, and the criteria in §279.11(c) for 404 permits;

(3) result in any violation of applicable water quality standards; or

(4) result in any violation of any other appropriate requirements of state law.

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§279.10. Final Commission Action on NPDES Permits.

(a) The executive director shall issue a final determination within 60 days from the date the draft permit is mailed by the Regional Administrator, United State Environmental Protection Agency (EPA), as required by 40 Code of Federal Regulations, §124.53, unless the executive director in consultation with the Regional Administrator finds that unusual circumstances require a longer time.

The executive director shall send notice, including a copy of the certification, to the applicant, the regional administrator and any person so requesting of the decision to deny, grant, grant conditionally or waive the certification. Such notification shall be in writing and shall include:

- (1) the name and address of the applicant;
 - (2) conditions which are necessary to assure compliance with the applicable provisions of the Federal Clean Water Act, §§208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of state law;
 - (3) when the state certifies a draft permit instead of a permit application, any condition required to assure compliance with the provisions of the Federal Clean Water Act, §§208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of state law shall be identified citing the Federal Clean Water Act or state law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and
 - (4) a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of state law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process.
- (b) The executive director shall not condition or deny an NPDES certification on the grounds that state law allows a less stringent permit condition.

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§279.11. Final Commission Action on Department of the Army Permits.

- (a) The executive director shall review all permit applications for consistency with §279.9 of this title (relating to Executive Director Review of Water Quality Certification) and shall issue a final determination within 60 days after receipt of a certification request from the district engineer as required by 33 Code of Federal Regulations §325.2(b) unless the executive director, in consultation with the district engineer, determines a shorter or longer period is reasonable.
- (b) Certification of discharges into aquatic ecosystems shall avoid unacceptable adverse impacts, including cumulative and secondary impacts.
- (c) The executive director shall review all request for certification of 404 permit activities using the following criteria;
- (1) No discharge shall be certified if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other more significant adverse environmental consequences. Activities which are not water dependent are presumed to have practicable alternatives, unless the applicant clearly

demonstrates otherwise. For the purposes of this section compensatory mitigation is not considered an alternative.

(2) No discharge of dredged or fill material shall be certified unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.

(3) Certification shall require appropriate and practicable compensatory mitigation for all unavoidable adverse impacts which remain after all practicable avoidance and minimization has been completed. Compensatory mitigation requirements will provide for a replacement of impacted functions and values.

(4) There may be circumstances where the impacts of the project are so significant that even if alternatives are not available, certification may be denied regardless of the compensatory mitigation proposed.

(d) The executive director shall send notice, including a copy of the certification, to the applicant, the district engineer, the designated contact of any other licensing or permitting agency and any person so requesting of the decision to deny, grant, grant conditionally, or waive certification. Such notification shall be in writing and shall include:

(1) the name and address of the applicant;

(2) a statement that the executive director:

(A) examined the complete application, specifically identifying the number or code affixed to such application, and based its determination upon an evaluation of the information contained in the application which is relevant to the 401 certification; and/or

(B) examined other information sufficient to enable the executive director to reach the decision;

(3) a statement of basis for the executive director's decision:

(A) if a waiver of certification is made, a statement explaining the determination that no discharge will result from the activity, or that the activity does not fall within the jurisdiction of the commission's authority, or the commission expressly waives its authority to act on a request for certification for other reasons; or

(B) if a certification or conditional certification is made:

(i) a statement that there is a reasonable assurance the activity will be conducted in a manner which will not violate the criteria enumerated in §279.9 of this title; or

(ii) a statement of conditions, including any monitoring and reporting requirements, which are necessary to assure compliance with the criteria enumerated in §279.9 of this title;

(C) if a denial of certification is made, a statement explaining why the activity will result in the unacceptable discharge of pollutants into or adjacent to waters in the state and detailing the criteria enumerated in §279.9 of this title which will be violated.

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§279.12. Other State Certification.

(a) Nationwide Permit Certification.

(1) The executive director shall consider all proposed nationwide permits for certification for activities which may result in any discharge into or adjacent to waters in the state consistent with §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application). Water Quality Certification for activities authorized under a nationwide permit is complete at the time the permit is issued. No additional certification is required for activities authorized under that nationwide permit.

(2) When a federal licensing or permitting agency proposes a nationwide permit for an activity which may result in a discharge, the executive director shall notify:

- (A) the Texas Parks and Wildlife Department;
- (B) the Texas Water Development Board;
- (C) the Texas General Land Office;
- (D) any other appropriate person.
- (E) any person who requests to be put on the mailing list; and
- (F) any other appropriate person.

(3) After considering comments and other information, the executive director shall grant, grant conditionally, deny, or waive certification.

(4) The executive director shall maintain a list of all certifications of nationwide permits granted or granted conditionally.

(b) General Permit Certification.

(1) The executive director shall consider all proposed general permits for certification for activities which may result in any discharge into or adjacent to waters in the state consistent with §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application). Water Quality Certification for activities authorized under a general permit is complete at the time the permit is issued. No additional certification is required for activities authorized under that general permit.

(2) When a federal licensing or permitting agency proposes a general permit for an activity which may result in a discharge, the executive director shall notify:

- (A) the Texas Parks and Wildlife Department;
- (B) the Texas Water Development Board;
- (C) the Texas General Land Office;
- (D) any other appropriate person;
- (E) any person who requests to be put on the mailing list; and
- (F) any other appropriate person.

(3) After considering public comments and other information the executive director shall grant, grant conditionally, deny, or waive certification.

(4) The executive director shall maintain a list of all certifications of all general permits granted or granted conditionally.

(c) Final Action on Other Certification.

(1) The executive director shall send notice, including a copy of the certification, to the applicant, the designated contact of the licensing or permitting agency, and any person so requesting of the decision to deny, grant, grant conditionally, or waive certification. Such notification shall be in writing and shall include:

- (A) the name and address of the applicant;
- (B) a statement that the executive director has either:

(i) examined the complete application, specifically identifying the number or code affixed to such application, and based its determination upon an evaluation of the information contained in the application which is relevant to the 401 certification; and/or

(ii) examined other information furnished by the applicant or provided in a nonadjudicative public hearing, sufficient to permit the executive director to reach the decision;

(C) a statement of basis for the executive director's decision:

(i) if a waiver of certification is made, a statement explaining the determination that no discharge will result from the activity, or that the activity does not fall within the jurisdiction of the commission's authority, or the commission expressly waives its authority to act on a request for certification for other reasons; or

(ii) if a grant or conditional grant of certification is made:

(I) a statement that there is a reasonable assurance the activity will be conducted in a manner which will not violate the criteria enumerated in §279.9 of this title; or

(II) a statement of conditions which the executive director deems necessary with respect to the discharge, including any necessary monitoring requirements to assure the discharge will not violate applicable water quality standards;

(iii) if a denial of certification is made, a statement explaining why the activity will result in the unacceptable discharge of pollutants into or adjacent to waters in the state and detailing the criteria enumerated in §279.9 of this title which will be violated.

(2) After considering public comments and other information, the executive director shall grant conditionally, deny, or waive certification.

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§279.13. Enforcement.

Any certification issued by the executive director pursuant to the provisions of this chapter shall not preclude the commission from undertaking any action under the provisions of Chapter 337 of this title (relating to Enforcement). Pursuant to §§26.019, 26.121(c), and 26.136 of the Texas Water Code and Chapter 337 of this title, the commission may issue orders, assess administrative penalties, and take other necessary action if a person violates the state water quality standards or other applicable state water quality requirements. The commission may also seek civil penalties and injunctive relief in state district court in response to a violation of the state water quality standards in accordance with the Texas Water Code, §§26.016 and 26.123.

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Amendments to §§279.1-279.13

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